ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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June 15, 2000

BY FACSIMILE

The Honorable John T. Spotila
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Spotila:

This letter follows up on the June 14, 2000 hearing of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, entitled "Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?" As discussed during the hearing, please respond to the attached followup questions for the record.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, June 30, 2000. If you have any questions about this request, please call Subcommittee Staff Director Marlo Lewis or Professional Staff Member Barbara Kahlow on 225-4407. Thank you for your attention to this request.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

Q1. OMB/OIRA Clearance of DOL's Baby UI Major Rule. On May 18, 2000, I wrote Office of Management and Budget (OMB) Director Jack Lew about the Department of Labor's (DOL's) pending-at-OMB final rule, entitled "Birth and Adoption Unemployment Compensation," popularly known as Baby UI. I objected to: (a) the absence of a regulatory impact analysis (RIA), (b) the absence of a Paperwork Reduction Act (PRA) submission for the Baby UI experiment prior to its finalization, and (c) the absence of a specific Congressional delegation for DOL's proposed revision of the 65-year old unemployment compensation system -- which was designed for the truly needy. On June 13th, you wrote me, stating "We forwarded a copy of your letter to the Department of Labor (DOL) and have considered your concerns about the rule's legal basis and compliance by DOL with Executive Order 12866 and the Paperwork Reduction Act. ... We believe that DOL has addressed in a satisfactory manner the concerns raised in your letter."

a. Since DOL has "consistently interpreted these provisions [of the Federal Unemployment Tax Act (FUTA)] as requiring that State UI laws contain tests to assure that UI is paid only to workers who lose their positions when employment slackens and who ... cannot find other work," i.e., workers who are "involuntarily unemployed" (DOL letter to Senator Patrick Leahy, July 17, 1997), under what specific Congressional statutory delegation of authority (i.e., under FUTA or any other Act), did OMB's Office of Information and Regulatory Affairs (OIRA) approve DOL's Baby UI rule, which would provide paid leave to workers who voluntarily quit or take time off from their jobs? Also, since there are no "able and available" requirements for the unemployment compensation program in Federal law, under what specific Congressional statutory delegation of authority did OMB/OIRA approve DOL's Baby UI rule? Do you agree with DOL's internal legal analysis documents that admit that the Baby UI rule will not withstand a court challenge? If not, why not?

b. You testified that, in the last five years, OMB has allowed at least 40 agency final major rules to be published without prior Congressional and public comment on their RIAs. You agreed to identify those 40 major final rules for the hearing record. When did it become OMB's practice to publish major final rules without public comment on their RIAs? Was this practice deliberately instituted as a matter of policy, or is it a pattern that has become apparent only in hindsight? If the former, please provide any documents discussing the pros and cons of OMB's decision to adopt such a practice. Finally, notwithstanding any possible change in OMB policy, why did OMB/OIRA not require Congressional and public comment on the draft RIA for the Baby UI rule before finalization of the rule, especially since DOL's estimates were seriously challenged by many commenters?

c. DOL's RIA includes a 1½ page discussion of regulatory alternatives, without cost estimates for each of them. The RIA also states, "Who is likely to Experience Costs ... the costs will ultimately be passed on, through employer taxes, in the

same manner as other benefit expansions" (p. 2). Please provide for the hearing record OMB's analysis of how DOL's RIA comports with each best practice in OMB's "Economic Analysis of Federal Regulations Under Executive Order 12866" (popularly known as OMB's "Best Practices Guidances"), especially the absence of cost estimates for regulatory alternatives. If DOL's RIA does not comport, why did OMB/OIRA clear DOL's final rule?

d. Why didn't OMB/OIRA require a regulatory flexibility analysis (RFA) for the Baby UI rule which, unlike the Family and Medical Leave Act, does not exempt small businesses? Why didn't OMB require DOL to consult with small businesses, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA), for all major rules affecting small businesses? As former General Counsel of the Small Business Administration (SBA), are you concerned about the substantial and costly effects the Baby UI rule will have on small businesses? Do you fear any precedential impact of DOL's ignoring the SBREFA and RFA requirements for the Baby UI rule?

e. In the preamble to its final rule under the caption Paperwork Reduction Act, DOL states, "**If** the evaluation of this experiment requires information collections ... we will seek OMB approval at that time" (emphasis added). Since the Federal Reports Act of 1942, OMB has been required to approve the paperwork associated with agency experiments. Why did OMB clear the Baby UI rule without first approving the associated paperwork for this experiment? Has OMB ever approved an agency's final major rule for an experiment prior to public comments on the paperwork associated with the experiment? If not, why did OMB do so for Baby UI?

Q2. <u>OMB/OIRA Clearance of EPA's PM-Ozone Rules.</u>

a. **OMB's Review of EPA's Disregard of Cost.** In *Lead Industries Association v. Environmental Protection Agency* (647 F.2nd 1130, 1148-49, D.C. Cir. 1980), the D.C. Circuit Court of Appeals held that the Environmental Protection Agency (EPA) may not consider cost in setting national ambient air quality standards (NAAQS). EPA followed *Lead Industries* when, in 1997, it set new NAAQS for particulate matter (PM) and ozone. However, the Appeals Court's opinion appears to be inconsistent with Sections 101(b)(1) and 312(a) of the Clean Air Act (CAA). Please address for the hearing record the following questions regarding OMB's review of EPA's PM and ozone standards.

i. Section 101(b)(1) specifies, as a core purpose of the CAA, "to promote ... the productivity capacity of its [the Nation's] population." Clearly, if the CAA is to promote productivity, then EPA must be allowed to consider cost when promulgating NAAQS. Does OMB agree? If not, why not?

Please provide any analysis OMB may have conducted on this topic during its review of the PM and ozone rules.

ii. Section 312(a) requires EPA to "conduct a comprehensive analysis of the impact of the [CAA] on the public health, **economy**, and environment of the United States," and to "consider the **costs**, benefits and other effects associated with compliance with each [NAAQS]" (emphases added). There would be little point to EPA's conducting a "comprehensive analysis" of the benefits and costs associated with NAAQS, if EPA were prohibited from considering cost in setting NAAQS. Does OMB agree? If not, why not? Please provide any analysis OMB may have conducted on this topic during its review of the PM and ozone rules.

iii. If OMB's review concluded that the Court of Appeals decided correctly in *Lead Industries*, please identify the specific provisions of the CAA, if any, that prohibit EPA from considering cost.

b. **OMB's Review of the Constitutionality of EPA's Construction of the CAA.** CAA Section 109(b)(1) requires EPA to set NAAQS at a level "requisite to protect the public health" with an "adequate margin of safety." EPA assumes that PM and ozone may harm public health at *any* level above zero. EPA also assumes that it may not, when setting NAAQS, consider cost, feasibility, or the health hazards of reduced economic growth. Thus, under EPA's reading of Section 109, EPA could prohibit *all* PM and ozone emissions from *all* sources -- in other words, institute a policy of deindustrialization. However, Congress did not intend to delegate such power to EPA, because one of the CAA's core purposes is to "promote" the Nation's "productive capacity."

i. Does OMB agree that Section 109 does not grant the virtually unlimited discretion EPA assumed when it set the NAAQS for PM and ozone? If not, why not?

ii. Please provide any analysis OMB may have conducted on the scope of EPA's discretion under Section 109 during its review of the PM and ozone rules.